

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MOLLY JACOBSEN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WINSTON,
10 *Respondent,*

11
12 and

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14 FULLERTON & LEFEVRE,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2010-074

18 ORDER

19 **MOTION FOR ATTORNEY FEES**

20 Respondent moves for an award of attorney fees pursuant to ORS 197.830(15)(b),
21 which provides:

22 “The board shall * * * award reasonable attorney fees and expenses to the
23 prevailing party against any other party who the board finds presented a
24 position without probable cause to believe the position was well-founded in
25 law or on factually supported information.”

26 As we explained in *Wolfgram v. Douglas County*, 54 Or LUBA 775, 775-76 (2007):

27 “Under ORS 197.830(15)(b), a position is presented ‘without probable cause’
28 where ‘no reasonable lawyer would conclude that any of the legal points
29 asserted on appeal possessed legal merit.’ *Contreras v. City of Philomath*, 32
30 Or LUBA 465, 469 (1996). In applying the probable cause analysis LUBA
31 ‘will consider whether any of the issues raised [by a party] were open to
32 doubt, or subject to rational, reasonable, or honest discussion.’ *Id.* The party
33 seeking an award of attorney fees under the probable cause standard must
34 clear a relatively high hurdle and that hurdle is not met by simply showing
35 that LUBA rejected all of a party’s arguments on the merits. *Brown v. City of*
36 *Ontario*, 33 Or LUBA 803, 804 (1997).”

37 Thus, attorney fees are warranted under ORS 197.830(15)(b) where the prevailing party
38 demonstrates that no reasonable lawyer would present any of the “positions” that the losing

1 party presented on appeal. Conversely, a party may avoid attorney fees if the party presented
2 at least one position on appeal that satisfied the probable cause standard. *Pro se* litigants are
3 subject to the same standards as lawyers. *Squires v. City of Portland*, 33 Or LUBA 783,
4 *aff'd* 149 Or App 436, 942 P2d 303 (1997).

5 Petitioner appealed a city planning director's decision to grant city planning
6 department approval of intervenor-respondent's building permit application to construct a
7 loading dock expansion at a bottling plant. In the response brief and in a motion to take
8 evidence filed simultaneously with the response brief, the city moved to dismiss the appeal
9 on multiple bases, one of which argued that the decision was not a land use decision subject
10 to LUBA's jurisdiction because it was a "building permit issued under clear and objective
11 land use standards[.]" ORS 197.015(10)(b)(B). Petitioner filed a 12-page response to the
12 city's motions. We agreed with the city and dismissed the appeal. *Jacobsen v. City of*
13 *Winston*, __ Or LUBA __ (LUBA No. 2010-074, September 19, 2011). Respondent then
14 moved for an award of attorney fees.

15 When a case is dismissed on jurisdictional grounds, the arguments presented on that
16 issue determine whether or not attorney fees will be awarded. *Cape v. City of Beaverton*, 47
17 Or LUBA 625, 626 (2004). Petitioner advanced several legal theories in her petition for
18 review and in her reply to respondent's motions regarding why the challenged decision was
19 not based on "clear and objective standards." Petitioner argued that in making the
20 challenged decision the city was required to but did not in fact determine whether the subject
21 property was a "lot of record" under Winston Zoning Ordinance (WZO) 1.020, and that
22 making that determination requires discretion.¹ In our decision dismissing petitioner's
23 appeal, we assumed without deciding that the city was required to determine whether the
24 subject property was a "lot of record" under WZO 1.020. Under WZO 1.020 there are five

¹ Although petitioner used the phrase "discretion and legal judgment" in her pleadings, we understand that to be an argument that the applicable standards were not "clear and objective" under ORS 197.015(10)(b)(B).

1 categories of lots of record. We concluded that determining whether a lot fell into four of
2 those categories did not require the exercise of significant discretion, but that determining
3 whether a lot fell into one of those categories might require the exercise of discretion.
4 Because petitioner did not specifically argue that category that might require the exercise of
5 discretion applied, we resolved the jurisdictional issue in the city's favor.

6 In our view petitioner's argument that a determination as to whether a property for
7 which a building permit is sought is a "lot of record" could require the exercise of discretion
8 qualifies as an argument that was presented with "probable cause to believe the position was
9 well-founded in law * * *," within the meaning of ORS 197.830(15)(b). We cannot say that
10 no reasonable lawyer would advance the argument that petitioner advanced.

11 Respondent's motion for attorney fees is denied.

12 **COSTS**

13 Respondent requests an award of the costs of copying the record, in the amount of
14 \$5.00. OAR 661-010-0075(1)(b)(B). Respondent is awarded costs in the amount of \$5.00, to
15 be paid from petitioner's deposit for costs. The Board will return the remainder of the deposit
16 for costs to petitioner. OAR 661-010-0075(1)(d).

17 Dated this 3rd day of November, 2011.
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25 Melissa M. Ryan
Board Chair